

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Petition for Declaratory Ruling that
AT&T's Phone-to-Phone IP Telephony
Services Are Exempt from Access
Charges

WC Docket No. 02-361

**MOTION
TO ACCEPT LATE-FILED REPLY COMMENTS**

The People of the State of California and the California Public Utilities Commission ("California" or "CPUC") respectfully submit this Motion to Accept Late-Filed Reply Comments in the above-referenced docket. California seeks to submit the attached reply comments six days after the filing date of January 24, 2003. Because of the recent addition of a new commissioner at the CPUC, and the need for the CPUC to authorize the filing of these comments at its regularly scheduled conference, California was unable to file these comments before January 30, 2003.

Inasmuch as California's comments are late by only six days, we do not believe that any party will be unduly prejudiced. California thus respectfully requests that the FCC accept California's late-filed reply comments.

Respectfully submitted,

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January 30, 2003

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**REPLY COMMENTS OF CALIFORNIA
IN OPPOSITION TO AT&T PETITION**

The People of the State of California and the California Public Utilities Commission ("California" or "CPUC") hereby submit these reply comments in opposition to the Petition for Declaratory Ruling ("Petition") filed by AT&T, in which AT&T asks the Federal Communications Commission ("FCC") to exempt from interstate access charges AT&T's voice over Internet Protocol ("VOIP") phone-to-phone telephony service. AT&T also asks the FCC to "provide guidance to states who follow the federal rule in assessing intrastate access charges."¹

In its petition, AT&T argues that incumbent local exchange carriers ("LECs") are unlawfully assessing access charges on AT&T's provision of phone-to-phone VOIP service. In AT&T's view, such an assessment is contrary to

¹ Pet. at 1.

congressional intent under the Telecommunications Act of 1996 (“1996 Act”) and contrary to FCC access charge policy.²

AT&T describes its service as an offering of “basic phone-to-phone IP telephony” service over Internet backbone facilities.³ For originating calls, AT&T purchases access service and pays access charges. AT&T, however, terminates calls using the local private business lines purchased from the incumbent LEC, or reciprocal compensation trunks purchased from a competitive LEC.⁴ AT&T pays no access charges for these termination services.

AT&T maintains that incumbent LECs have begun to deny AT&T the use of end-user local business lines to terminate its service, or are otherwise using Calling Party Number identifiers to assess access charges on AT&T’s VOIP calls that terminate over reciprocal compensation trunks.⁵ AT&T claims that the incumbent LECs actions are unlawful, based on two arguments. First, AT&T asserts that the assessment of terminating access charges on its service is regulation or taxation of the Internet in violation of congressional intent under the 1996 Act. Second, AT&T argues that assessing access charges on phone-to-phone VOIP violates federal access charge policy. For the reasons discussed below,

² Pet. at 2.

³ Pet. at 24.

⁴ Pet. at 4.

⁵ Pet. at 5.

neither argument has merit. California urges the FCC to deny AT&T's petition and declare that AT&T's VOIP service is subject to access charges.

I. ASSESSING ACCESS CHARGES ON AT&T'S VOIP SERVICE IS NOT REGULATION OF THE INTERNET

AT&T claims that regulation of its basic VOIP telephony service constitutes regulation or taxation of the Internet in derogation of congressional policy under the 1996 Act. AT&T's claim is meritless. Assessing access charges on a basic voice telephony service provided via the Internet that originates and terminates on the public switched network of the incumbent LEC does not constitute an assessment of charges on the Internet. Such assessment is an equitably apportioned charge on the telecommunications carrier for access to the local public switched network in providing basic telecommunications services. By whatever means a carrier offers basic phone-to-phone voice telephony -- whether via the Internet, wireless, fiber, microwave or other technology -- the carrier interconnects with the public switched network. The carrier thus imposes costs on this local network, and should bear a portion of such costs.⁶ In contrast, exempting these carriers from bearing their equitable share of network costs unfairly shifts more costs onto captive end-use customers.

It is true that in section 230 of the Act Congress sought to encourage development of and investment in new technologies and networks. 47 U.S.C.

⁶ In contrast, a computer-to-computer VOIP call does not interconnect with the local public switched network such that access charges should be applied.

§ 230(d). Congress, however, did not evidence any intent that a basic telephony service loses its status as a telecommunications service subject to the requirements of the Act and FCC rules simply because it utilizes new technologies or networks, including the Internet, in offering telecommunications services. “A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure.”⁷ In stating in section 230 that the Internet should be free from regulation, Congress intended to exempt Internet Service Providers which offer information services over the Internet from common carrier regulation. At the same time, Congress intended that carriers offering telecommunications services would continue to be subject to regulation “regardless of the facilities used.” 47 U.S.C. § 153(46); 47 U.S.C. § 153(44). AT&T’s VOIP telephony service falls within sections 153(46) & (44). Indeed, the fact that AT&T acknowledges that it contributes to universal service support based on revenues derived from its phone-to-phone VOIP basic telephony service belies its claim that regulation of this service constitutes a tax on the Internet.⁸

⁷ In re Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501 (1998), ¶ 59 (“Universal Service Report”).

⁸ Pet. at 32-33.

II. Assessing Access Charges on AT&T's VOIP Service Is Not Contrary to Federal Policy

AT&T's alternate claim that the imposition of access charges on its VOIP service is "quite clearly contrary" to federal policy likewise lacks merit. Indeed, just the opposite is true.

In its Universal Service Report, the FCC stated that the "classification of a service under the 1996 Act depends on the functional nature of the end-user offering."⁹ In analyzing phone-to-phone IP telephony, the FCC observed that "[f]rom a functional standpoint, users of these services obtain only voice transmission, rather than information services such as access to stored files."¹⁰ The FCC accordingly concluded, on a tentative basis, that phone-to-phone IP telephony constitutes a "telecommunications service" and those offering such service were "telecommunications carriers" within the meaning of sections 153(46) & (44) of the Act.¹¹

Having classified phone-to-phone telephony service, the FCC went on to state that the Act and federal rules impose various requirements on telecommunications carriers, including contributing to universal service, paying interstate access charges, and providing access to the disabled. See, e.g.,

⁹ Id., ¶ 86.

¹⁰ Id., ¶ 89.

¹¹ Id. See also n.188 ("[r]outing and protocol conversion within the network does not change this conclusion [that IP phone-to-phone telephony service is a telecommunications service] because from the user's standpoint there is no net change in form or content.")

47 U.S.C. § 254(d) (every telecommunications carrier that provides interstate telecommunications service shall contribute to universal service). These requirements do not apply to ISPs offering information services.

AT&T acknowledges that its VOIP service is functionally a “basic phone-to-phone IP telephony” service which AT&T provides over AT&T-owned or operated Internet backbone facilities interconnected with the public switched network. AT&T offers this service indiscriminately directly to the public for a fee, and enables customers to call telephone numbers assigned in accordance with the North American Numbering Plan.¹² AT&T’s offering of VOIP service plainly qualifies as a “telecommunications service” and AT&T qualifies as a “telecommunications carrier” within the meaning of the 1996 Act.

AT&T cannot reasonably dispute this regulatory status. By its own admission, AT&T acknowledges that it currently pays universal service support on the revenues from all its “non-enhanced VOIP calls that it carries over the Internet and that fall within the definition of phone-to-phone IP telephony and of telecommunication services.”¹³ AT&T would not be obligated to do so unless it were a telecommunications carrier offering interstate telecommunications services. 47 U.S.C. § 254(d).¹⁴ Nevertheless, AT&T seeks to exempt itself from paying

¹² Pet. at 10-11, 18-19, 24.

¹³ Pet. at 32-33.

¹⁴ AT&T would likewise be obligated to comply with other requirements of the Act. *Id.* at n. 189 citing §§ 214, 222, 251(a), 255 and filing, reporting and fee requirements.

access charges when offering non-enhanced VOIP calls. AT&T makes several arguments, none of which have merit.

AT&T first asserts that to impose access charges on AT&T's "basic phone-to-phone telephony service" would be contrary to FCC policy to exempt ISPs from having to pay access charges. The problem with this assertion is that AT&T is not an ISP when it offers its VOIP service. It is a telecommunications carrier offering a telecommunications service. Longstanding federal policy requires telecommunications carriers which offer interstate telecommunication services to pay access charges.

AT&T next suggests that because the facilities over which its VOIP telephony service is provided may also carry information services exempt from access charges, the VOIP telephony service should likewise be exempt from access charges.¹⁵ This suggestion fails for at least two reasons. First, whether the facilities used to provide telecommunications services also provide information services is irrelevant. "Congress' direct[ed] that the classification of a provider should not depend on the type of facilities used. Its classification depends rather on the nature of the service being offered to customers."¹⁶ The FCC thus exempted information services (formerly, enhanced services) and ISPs from access charges because of the nature of the service they offered, not because they

¹⁵ Pet. at 27-28.

¹⁶ Universal Service Report, ¶ 59.

were provided using a particular technology or type of facilities.¹⁷ Based on the nature of their services, the FCC distinguished ISPs from IECs for the purpose of assessing access charges. The FCC allowed ISPs to be treated as “end users” when providing new types of information services, and on that basis, exempted them from the access charge regime. In this case, AT&T does not qualify as an end user of local business service simply because it is utilizing Internet facilities instead of traditional facilities when providing a basic voice service. In offering “non-enhanced VOIP service,” AT&T is a telecommunications provider of a telecommunications service and hence subject to the federal access charge regime “regardless of the facilities used.” Cf. 47 U.S.C. § 153(46). Contrary to AT&T’s argument, it is not the “technologies” that are subject to access charges,¹⁸ but the basic telephony services offered by a common carrier that are so subject. The fact that AT&T may also offer information services as an ISP over the Internet does not change AT&T’s status as a telecommunications carrier when it offers its basic telephony service. If that were so, then by AT&T’s logic AT&T should also be exempt from paying access charges for its interexchange telephone services offered over wireline facilities to the extent that AT&T also offers information

¹⁷ Pet. at 6; Universal Service Report, ¶ 95 (Congress did not limit the regulation of “telecommunications services” to circuit-switched wireline transmission.)

¹⁸ Pet. at 7.

services, such as voice mail, over those same facilities.¹⁹ That result is obviously without merit.

The FCC should also reject AT&T's implicit suggestion that AT&T's offering of basic VOIP phone-to-phone telephony service and other VOIP services that qualify as information services renders all offerings information services under the so-called contamination theory. The FCC rejected a similar argument in its Frame Relay Order.²⁰ In that case, the FCC found that AT&T's InterSpan service consisted of both a basic transmission service and an enhanced (information) service. The FCC properly held, consistent with longstanding policy, that because AT&T owned or operated the facilities over which it offered its InterSpan service, the basic transmission portion of the service was severable from the enhanced portion, and subject to the regulatory requirements of the Act and federal rules.²¹

Similarly here, AT&T owns or operates the facilities over which both basic phone-to-phone VOIP and enhanced (information) services are offered.²² Under existing federal policy, the basic VOIP service is severable from the information

¹⁹ By similar logic, wireless carriers offering basic voice service should likewise have been exempted from access charges when their technology was developed.

²⁰ In re Independent Data Communications Manufacturers Ass'n, Inc., 10 FCC Rcd 13717 (1995).

²¹ The fact that AT&T's InterSpan basic frame relay transmission service utilized new, high-speed packet-switching technology had no bearing on whether the service was subject to Title II of the Act.

²² Pet. at 8.

services, a point which AT&T itself acknowledges by segregating revenues from its “non-enhanced VOIP calls” from other VOIP calls for universal service purposes.²³

As a further reason not to assess access charges, AT&T cites to the FCC’s statement in its Universal Service Report that difficult and contested issues may arise if such charges apply to providers of phone-to-phone IP telephony service.²⁴ In its Report, the FCC specifically stated that “it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge scheme, or intrastate.”²⁵ AT&T, however, acknowledges that its VOIP service can be distinguished for jurisdictional purposes because AT&T passes Calling Party Number (“CPN”) identification.²⁶ Thus, the technical difficulty identified by the FCC does not exist with respect to AT&T’s VOIP service. AT&T nonetheless argues that it would not be fair to assess access charges on its VOIP service when other VOIP services “have had no reason to track or pass Calling Party Number” and therefore would be exempt from access charges.²⁷ The simple answer is to require these other providers to pass CPN. Alternatively, on those calls where it may be technically

²³ Pet. at 32-33.

²⁴ Pet. at 31.

²⁵ Universal Service Report, ¶ 91.

²⁶ Pet. at 31.

²⁷ Pet. at 19, 31.

infeasible to pass CPN, a proxy could be developed similar to the FCC's ten percent rule developed for special access services.

At bottom, AT&T's chief complaint appears to be that access charges are too high because AT&T believes they are above cost.²⁸ If true, the solution is not to exempt AT&T from paying access charges that are legitimately assessed on AT&T as a telecommunications carrier offering a telecommunications service, but to adjust these charges to ensure that they are cost-based. By exempting AT&T and other telecommunications carriers offering VOIP phone-to-phone service from access charges, AT&T seeks improperly to shift a greater share of the costs of the public switched network onto captive end-use customers. Such result is neither fair, reasonable nor warranted.²⁹

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²⁸ Pet. at 6. 10.

²⁹ AT&T's pleading in reality is a petition for waiver of the FCC's existing access charge rules. AT&T, however, has demonstrated only that it is in AT&T's self-interest to waive these rules, and not in the public interest.

III. Conclusion

For the reasons discussed, California respectfully urges the FCC to deny AT&T's petition for declaratory ruling and to declare that AT&T's VOIP phone-to-phone telephony service is subject to access charges.

Respectfully submitted,

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